

MEMORANDUM

October 7, 2004

TO: THE LOS ANGELES COUNTY CLAIMS BOARD

FROM: WILLIAM C. SIAS *WCS*
Deputy County Counsel
Special Services Division

RE: Marjorie H. Cherry and Ned W. Cherry v. County of Los Angeles, et. al.
Los Angeles Superior Court, Case No. BS 087150

DATE OF
INCIDENT: March 31, 1994

AUTHORITY
REQUESTED: \$66,215.34⁹

COUNTY
DEPARTMENT: Auditor-Controller

CLAIMS BOARD ACTION:

☒ Approve

☐ Disapprove

☐ Recommend to Board of
Supervisors for Approval

Rocky A. Armfield, Chief Administrative Office
ROCKY A. ARMFIELD

John F. Krattli, County Counsel
JOHN F. KRATTLI

Maria M. Oms, Auditor-Controller
MARIA M. OMS

on November 8, 2004

SUMMARY

This is a recommendation to settle for: (1) the immediate payment of deferred salary plus interest together with (2) the unpaid incremental retirement compensation plus interest and (3) future payments of additional retirement compensation on account of the 1991-1992 Deferred Performance Based Pay Plan. The final dollar amounts will be computed as of the effective date of the settlement. The estimated amounts for immediate payment are: (1) \$18,352.36 and (2) \$6,609.76 for a total of \$24,962.12. Item (3) represents additional retirement compensation which would be paid to the Plaintiff over the term of her remaining natural life in accordance with the terms of the 1991-1992 Deferred Performance Based Pay Plan. The estimated amount of all such future payments is \$41,253.27, which has a discounted present value of \$31,003.95.

The amount of the total settlement therefore is \$66,215.39. The Los Angeles County Employees Retirement Association ("LACERA") concurs with this recommendation.

LEGAL PRINCIPLE

The County entered into a contractual obligation to pay deferred salary to an employee under the 1991-1992 Deferred Performance Based Pay Plan. An employee who retired before the County established a system to identify plan participants is entitled to obtain the benefits of the original agreement despite the passage of time.

SUMMARY OF FACTS

In 1991, the County Board of Supervisors authorized the Chief Administrative Officer to institute a deferred salary program for middle and upper management County employees. The plan became known as the 1991-1992 Deferred Performance Based Pay Plan ("PBP Plan").

Under the 1991-1992 Board-approved PBP Plan, PBP participants were offered the option of: 1) deferring their full September 1, 1991 merit increase (based upon a PBP pool of 6 percent) for 12 months (from September 1, 1991 to August 31, 1992), or 2) receiving half of their merit increase effective September 1, 1991. Those choosing the first option began receiving their full salary increase on October 15, 1992 (for September 1992), and were able to begin to receive reimbursement of the deferred amount anytime on or after that date. Reimbursement could be deferred up to the year 2001. (See, 1992-1993 Deferral Fact Sheet, dated October 21, 1992 from Audrey Teate, Personnel Division to PBP participants.)

Paragraph 4 of the PBP Plan contract stated that: "County warrants that all amounts deferred pursuant to this Agreement shall constitute compensation earnable within the meaning of Government Code section 31461 at the time the funds are paid to Employee." The PBP Plan was structured to increase an employee's salary by the amount of the deferred 1991 merit increase with the effect of potentially increasing the employee's retirement pension benefit. The PBP Plan was designed to treat the deferred salary as pensionable when paid, not when earned.

Plaintiff Marjorie Cherry, a County employee with the Department of Mental Health, participated in the PBP Plan. She elected to defer receipt of her salary under the PBP Plan.

On September 11, 1992, the Board of Retirement of LACERA, on the advice of its fiduciary counsel, held that for purposes of the Retirement Association under Government Code Section 31460, deferred salary is pensionable when earned, not when paid. [Letter of January 20, 1993 from the Chief Administrative Officer to Board of Supervisors re: Approval of Paymaster Agreement.] LACERA's position nullified the provisions of paragraph 4 of the PBP Plan that the County would warrant that the deferred salary would be pensionable.

In response to LACERA's decision, the Chief Administrative Officer recommended that the Board of Supervisors enter into a contract with LACERA. In a letter to the Board, dated January 20, 1993, the Chief Administrative Officer advised the Board that the County was obligated to make the deferred salary amounts retirement-eligible at the time the participating employees were paid the deferred salary. He recommended that the Board enter into an agreement with LACERA "to include with normal retirement payments to affected employees the additional compensation due to these employees as a consequence of this contractual obligation, and for the County to pay LACERA the cost of the increased benefits with its normal retirement contribution." He further explained that the most prudent and cost-effective approach to fulfilling the County's obligation would be to have LACERA compute the PBP participant's normal retirement compensation, including the additional amount due as a result of the PBP Plan. The County would then pay to LACERA the cost of the increased benefits which, in turn, would send one monthly check to the retired employee. The single check would include the normal retirement contribution and the County's portion of the increased benefit. As a result, the County agreed that it would fund payments, structured like an annuity, for each PBP participant based on the amount of the deferred salary. The Board adopted the Chief Administrative Officer's recommendation on February 15, 1994.

The changes in the PBP Plan and the creation of the agreement with LACERA were communicated to County employees. The County Counsel, in a letter to "All Retired Deferred Salary Participants," stated:

"The agreement [the PBP Plan] provided that the amounts deferred would be pensionable when paid, rather than when earned. However, the Board of Retirement subsequently determined that the deferred amounts were pensionable when earned rather than when paid.

Since the County is still obligated by contract to make payments to retired employees which are equivalent to the amounts that would have been received by those employees had the deferred compensation been pensionable when received, the County has entered into an agreement with LACERA to make the required payments on the County's behalf. The payments, while funded by the County, will be included in the retiree's monthly retirement warrant."

The agreement between the County and LACERA became known as the Paymaster Agreement. After the Board's initial approval in February of 1994, it took several months to negotiate the terms of the agreement and establish procedures for LACERA's administration of the PBP Plan. Under the Paymaster Agreement, the County was required to provide specific information regarding the PBP participants including the employee's name, department number, employee number, and a social security number. If an eligible employee had not yet made an election under the PBP Plan or retired from employment as of the date of the agreement, the County was required to provide the information within 30 days after the employee was paid his or her final deferred payment. For its part, LACERA made changes to its computer software programs that allowed it to identify the PBP Participants and to compute the amount of the County's contribution under the Paymaster Agreement. After the initial approval of the Paymaster Agreement, LACERA and the County exchanged information during the testing and implementation of LACERA's computer system. The Paymaster Agreement contained a comprehensive indemnification clause in favor of LACERA. The Paymaster Agreement became effective on June 1, 1994.

For the period between the Board's approval of the Paymaster Agreement in February 1994 and its effective date of June 1994, neither the County nor LACERA had a computerized system to identify PBP participants who had retired and who were eligible to make their final election to receive their deferred salaries. Instead, internal County memoranda indicate that department heads were instructed to monitor their respective departments and PBP

participants and to provide employee information regarding retirement of a PBP participant to the Auditor-Controller. Documents exchanged by the County and LACERA during that period also illustrate LACERA's efforts to modify its computer system to properly identify all employees who were PBP participants. Evidence in these documents reveal that the Plaintiff was identified as one employee whose information had not been properly recorded in LACERA's computer programs.

Plaintiff retired from County employment on March 31, 1994. Prior to her retirement, Plaintiff and her husband attended LACERA retirement seminars to plan for Plaintiff's retirement. The Plaintiff requested and obtained a projected retirement benefit estimate in late 1993 which was based on her projected future salary as of the date of her planned retirement.

In December 2001, Plaintiff received a letter from the County which advised her that she had not received her deferred salary when she had retired in 1994. The letter indicated that the County was holding the amount of \$3,321.00 on her behalf and it was prepared to release this amount to her. As a result of this information, Plaintiff began to investigate the circumstances surrounding the delayed payment of the deferred salary. Plaintiff demanded that the County pay interest on the deferred amount and provide future retirement compensation and unpaid compensation with interest. The County refused but offered to pay the principal amount of \$3,321.00 with interest at eight percent. Plaintiff refused this offer and initiated several requests for information under the California Public Records Act to both LACERA and the County.

Plaintiff filed a written claim with the County. The claim was denied on May 22, 2002. Plaintiff filed a verified complaint on December 5, 2003.

DAMAGES

Plaintiff identified the following categories of damages or relief requested: 1) the deferred salary of \$3,321.86 plus interest computed from the date of retirement; 2) payment of the additional benefit due under the PBP Plan plus interest computed from the date of retirement; and 3) inclusion in the Paymaster Agreement.

STATUS OF CASE

The parties agreed to settle the matter after participating in the Alternative Dispute Resolution process (ADR) before a Court appointed mediator.

The parties have executed a settlement agreement which is subject to approval by this Claims Board. A copy of the settlement agreement is attached.

The case is currently scheduled for a hearing re: order to show cause for failure to file notice of dismissal on November 10, 2004.

Expenses incurred by the County in defense of this action are attorneys fees of \$16,158.90.

EVALUATION

The County disputed the liability. The evidence developed during discovery supported the Plaintiff's original claims that she had participated in the PBP Plan and did not receive the additional compensation at the time of her retirement. Documentary evidence produced by the County show facts that contradict the County's continued ability to dispute the liability. County Counsel and the Chief Administrative Office, at the time of the underlying events, represented to the Board of Supervisors that the County was contractually obligated to provide for the benefits promised under PBP Plan. The County and LACERA negotiated the Paymaster Agreement to address the County's liability under the PBP Plan and to provide for the PBP Plan participants to receive benefits that were comparable to the terms of the original PBP Plan. Based on the evidence that would be presented at trial on this case, there is little likelihood of a favorable result for the County.

LACERA, as co-defendant, has taken the position that the facts and evidence support the Plaintiff's claims for recovery. LACERA has also taken the position that the likelihood of success at trial is remote. LACERA has reserved its right to enforce the indemnity agreement against the County.

The proposed settlement makes the Plaintiff whole with respect to her participation in the PBP Plan. The settlement at this time will conserve further litigation costs and forestall a verdict that would exceed the proposed settlement.

APPROVED: 

LAWRENCE B. LAUNER
Assistant County Counsel
Special Services Division

WCW:jb

Attachment